

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling

RM-8657

Regarding the definition of "public
safety facility" for purposes of Section
94.59 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1996;

Released: April 10, 1996

By the Acting Chief, Wireless Telecommunications
Bureau:

I. Introduction

1. The South Florida Water Management District ("South Florida") filed a petition for a declaratory ruling that its 2 GHz microwave network constitutes a "public safety facility" within the meaning of Section 94.59 of the Commission's Rules, 47 C.F.R. §94.59. At issue here is whether South Florida's water district operations will be subject to a two-year voluntary and one-year mandatory relocation requirement allowed to all microwave entities, or whether it will have a four-year voluntary and one-year mandatory relocation requirement, permitted for some public safety entities. Oppositions were filed by the Personal Communications Industry Association (PCIA)¹ and by UTAM, Inc. (UTAM).² South Florida filed a responsive pleading. For the reasons discussed below, we deny South Florida's petition.

II. Background

2. The Commission has defined "public safety facility" as "Part 94 facilities currently licensed on a primary basis under the eligibility requirements of Section 90.19, Police Radio Service; Section 90.21, Fire Radio Service; Section 90.27, Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services; provided that

the majority of communications carried on those facilities are used for police, fire, or emergency medical services operations involving safety of life and property."³ However, it also stated that "we will permit current licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, to request similar treatment upon a showing that the majority of the communications carried on those facilities are used for operations involving safety of life and property."⁴

3. It was the Commission's intent that the special treatment afforded public safety facilities should be narrowly defined and limited to only those facilities directly used for police, fire, or emergency medical services operations involving safety of life and property.⁵ The Commission further stated that public safety and special emergency radio service operations that do not meet this criteria do not warrant the special protection of a longer relocation period.⁶

III. Pleadings

4. South Florida, a public utility, argues that its microwave network qualifies for public safety status, and hence the longer relocation period. South Florida contends that it meets the test of Section 94.59(f): the majority of communications carried on the network are used for operations involving the safety of life and property.

5. Opponents argue that the Commission's relocation scheme already adequately protects all microwave incumbents, including public safety incumbents.⁷ PCIA states that applicable relocation requirements include:⁸

- All relocation costs, including engineering, equipment, site costs, and FCC fees to be paid entirely by the emerging technology licensee;
- New facilities to be comparable to the facilities being replaced;
- The new facilities to be completed and tested prior to the relocation;
- If the new facilities are not equivalent, the incumbent may relocate back to its original facilities until equivalence is attained.

Opponents further argue that expanding the public safety classification to additional categories of licensees will delay the deployment of PCS with no demonstrable countervailing public interest benefit.⁹

¹ PCIA is an international trade association, some of whose members are Personal Communications Service (PCS) auction winners. These entities will be required to relocate fixed microwave incumbents from the 2 GHz band in order to deploy their PCS systems. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. PCIA Comments at 1, n.1.

² Originally, the "Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management." UTAM is the frequency coordinator for the unlicensed PCS spectrum, and is responsible for relocating the microwave links currently operat-

ing in the unlicensed spectrum and managing the deployment of unlicensed PCS devices and systems to the public. UTAM Comments at 1.

³ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993) ("Third Report and Order"), *aff'd*, Memorandum Opinion and Order, 9 FCC Rcd 1943, paras. 36-46 (1994) ("Final Memorandum Opinion and Order").

⁴ Third Report and Order, para. 52.

⁵ Final Memorandum Opinion and Order, paras. 40-41.

⁶ *Id.*, para. 41.

⁷ PCIA Opposition at 2; UTAM Opposition at 3-4.

⁸ PCIA Opposition at 3, citing Final Memorandum Opinion and Order, para. 35 (1994).

⁹ *Id.* at 4.

6. PCIA argues that by South Florida's own admission, the majority of its microwave network does not relate to protecting life and property from imminent substantial risks as required under the Commission's public safety classification. It points out that South Florida has made no showing that the majority of communications carried by its microwave network rise to the same level of protection of the public from imminent danger as do police, fire, and emergency medical services.¹⁰ In contrast, PCIA contends, the facilities categorized as public safety by the FCC are characterized by the need for immediate response to situations threatening life and property. Rather, PCIA argues, South Florida's facilities are more akin to the public-utility type communications which were specifically excluded from the FCC's limited public safety definition.¹¹

7. UTAM argues that it is important not to expand the class of licensees subject to a longer relocation period because UTAM must be able to generate sufficient revenue to continue relocation activities by rapidly clearing incumbent microwave licensees from the spectrum allocated to unlicensed devices.¹² UTAM believes that the Commission has acknowledged this by establishing only a one-year mandatory relocation period for links located in spectrum designated for unlicensed PCS devices and systems.¹³

8. South Florida responds that the issue before the Commission is whether its microwave network is used primarily "for operations involving safety of life and property" as that phrase is used in Section 94.59(f). If so, South Florida contends, the Commission should classify the system as a public safety system as requested.

9. South Florida states that its microwave system supports flood protection, water supply, water quality, and environmental protection.¹⁴ South Florida contends that each year, its microwave system prevents tens of millions of dollars in property damage and saves countless lives by preventing flooding and water contamination.¹⁵ South Florida indicates that its microwave system's primary function is to monitor and control gates and levees for the purpose of protecting life and property,¹⁶ and that a malfunction in this system during a heavy rain could result in massive flooding or massive aquifer contamination within only a few minutes of the malfunction.¹⁷

10. Thus, South Florida asserts that opposition to its request to classify its system as public safety on the theory that the communications do not reduce risks of damage or injury that are "imminent" is incorrect.¹⁸ In addition, South Florida asserts that the system is also used in emergencies to perform special property and life-saving functions. For example, South Florida states, in the aftermath

of Hurricane Andrew, the system was used by the Federal Emergency Management Agency to assist with emergency delivery of medical supplies and drinking water.¹⁹

11. South Florida also argues that contrary to both the oppositions, classifying its microwave system as a public safety system under Section 94.59(f) will not set a precedent requiring the FCC to classify the microwave systems of numerous utilities as public safety systems. It believes that the core purpose of the vast majority of utilities is not to prevent damage to property and life, but to ensure the smooth flow of utility services like power. Finally, South Florida argues that the Commission's own records provide evidence that few, if any, utilities are used primarily to protect property and life within the meaning of Section 94.59(f). It also notes that not a single utility has petitioned the Commission to classify its microwave system as a public safety system.²⁰

IV. Discussion

12. Independently of the petition before us, the Commission has already promulgated relocation requirements that ensure that relocated entities will be provided with comparable facilities permitting equivalent communications services at no cost to the existing licensees, and that such facilities will be provided without disruption of any services.²¹

13. In the *Third Report and Order*, the Commission clarified the definition of public safety licensees operating 2 GHz microwave facilities that would receive special treatment.²² There, the Commission stated that the standard for this class of facilities will be narrowly construed to include only communications "directly used for police, fire, or medical emergency services operations involving safety of life and property. . .". For other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, (including South Florida's operations at issue herein), the standard is that the majority of the communications carried on those facilities must be used for operations involving safety of life and property.²³ Contrary to South Florida's interpretation that all public safety licensees are automatically qualified for the longer relocation period,²⁴ the Commission's explanation of this standard specifies that exempt communications are only a subset of communications facilities licensed in the public safety services.²⁵

14. Several petitions for reconsideration of the *Third Report and Order* were filed by public safety organizations concerning redefining the public safety microwave facilities eligible for the extended relocation period. They claimed, as does South Florida, that public safety entities other than

¹⁰ *Id.* at 5.

¹¹ Citing *Final Memorandum Opinion and Order*, paras. 46-52.

¹² UTAM Comments at 6-7.

¹³ *Id.*, citing the *Third Report and Order*, paras. 15, 23 (1993).

¹⁴ South Florida Petition at 3-8.

¹⁵ South Florida Reply at 1-2.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at n.3.

²⁰ *Id.* at 3-4.

²¹ *Final Memorandum Opinion and Order*, para. 35.

²² *Third Report and Order*, para. 52.

²³ *Id.*, paras. 51-52.

²⁴ South Florida Petition at 2.

²⁵ Specifically, Police Radio Service (Section 90.19); Fire Radio Service (Section 90.21); Emergency Medical Radio Service (Section 90.27); Special Emergency Radio Services (Subpart C of Part 90). As an additional safeguard, the Commission permits current licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, to request similar treatment upon a showing that the majority of the communications carried on those facilities are used for operations involving safety of life and property. *Third Report and Order*, para. 52.

those specifically noted in the *Third Report and Order* support operations that deal with safety of life and property and, therefore, should be given special treatment. The Commission disagreed. In the *Final Memorandum Opinion and Order*, the Commission reaffirmed its decision to narrowly define public safety for the purposes of determining which licensees qualify for a longer relocation period, thus excluding microwave facilities that provide only limited communications involving the direct, immediate safety of life and property.

15. All public safety systems could be defined as transmitting communications concerning the safety of life and property. Both the *Third Report and Order* and the *Final Memorandum Opinion and Order* demonstrate that the Commission did not want to give special treatment to all public safety microwave networks, but only to those where the majority of communications are directly used for police, fire, medical emergency service operations, or other similar immediate emergency uses involving the safety of life and property.

16. While South Florida's communications are very important, we cannot conclude on balance that a microwave system whose primary function is to monitor and control gates and levees to adjust water levels meets the Commission's narrow standard for obtaining a longer relocation period.²⁶ To do so, we believe, would substantially broaden this standard and thus negatively impact implementation of services employing new technologies which are needed by the public.

V. Ordering Clause

17. Accordingly, IT IS ORDERED, pursuant to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. §554, and Section 1.2 of the Commission's Rules, 47 C.F.R. §1.2, that the Petition for Declaratory Ruling filed by the South Florida Water Management District IS DENIED for the reasons discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar
Acting Chief, Wireless Telecommunications Bureau

²⁶ See para. 8, *supra*. South Florida gave one example of a use of its facilities which may constitute emergency communications, i.e., emergency delivery of medical supplies and drinking

water in the wake of a hurricane. However, South Florida indicates that this type of use is not the primary use of their facilities. See para. 9, *supra*.